that the appellant's claim was approved by the Commission for less than the full amount thereof. It was therefore clearly entitled to a hearing "with respect to such claim." But the majority say that, even if a hearing was denied as appellant contends it was, a court cannot compel the Commission to hold one because the statute also provides that "The action of the Commission in allowing or denying any claim . . . shall be final and conclusive on all questions of law and fact and not subject to review . . . by any court . . . ." This is where I leave the majority, because I think, for reasons which will be made apparent, the provision just quoted should be read as though it included the words I insert in brackets: "The action of the Commission [taken pursuant to prescribed procedures] in allowing or denying any claim . . . shall be final and conclusive on all questions of law and fact [as to the merits of the claim] and not subject to review . . . by any court . . ."

The first interpolation bracketed above is necessarily inherent in the provision because it would be perfectly idle for Congress to prescribe a procedure such as the holding of a hearing and then immediately to nullify the requirement by providing that the agency may disregard it with impunity. The second bracketed interpolation is proper for two reasons. First, it will be observed that every action of the Commission is not exempted from judicial scrutiny, but only that which allows or denies a claim. Obviously this has reference to the merits of the claim. The words "in allowing or denying any claim" define the kind of Commission action intended to be untouchable. The statutory provision does not say the Commission shall be exempt from judicial compulsion to grant the hearing ordered by its governing statute. There is no provision to the effect that courts may not correct Commission action taken in defiance of a legislative mandate by remanding for action in accordance therewith.

The second reason for my second interpolation in the quoted provision of the statute is found in the legislative history to which appellee and the majority draw attention. Both quote at length from a statement by Congressman Ribicoff, the chief proponent of the bill in the House, when he summarized the purpose of the finality provisions. But he also said, *inter alia*, "Those provisions mean precisely what they say. The actions of the Commission insofar as they refer to the merits of claims will be final. They will not be subject to review by the courts of our judicial system."

The appellee comments that this statement, when read out of context, "might be seized upon as implying that Congressman Ribicoff considered the finality and non-reviewability clauses as covering only 'the merits of the claims' and not procedural matters . . . ." The Congressman did not merely imply but flatly stated that the finality provisions cover only the action of the Commission as to the merits of claims. There is nothing in the context to indicate he meant anything else. There was considerable discussion of the desirability of preventing litigation concerning the claims so that the final settlement of the fund would not be delayed. The non-reviewability provision accomplishes that, so long as the Commission acts within the authority conferred upon it. When the Commission acts without authority, as it did here, it is solely responsible for the delay caused by subsequent litigation concerning its right to do so.

The foregoing illuminates the error of the majority: Apparently they think the appellant seeks review of "action of the Commission in allowing or denying any claim," which the statute forbids. What the appellant really seeks is that the Commission be mandatorily enjoined to hold the hearing which the statute requires and which it has denied. It does not ask that we review the Commission's decision on the merits but merely that we

require the Commission to conduct a hearing before making its own decision on the merits. To be sure, the appellant prays that the Commission's order be set aside, and that the case be remanded for a hearing before decision. That is the only way its right to a hearing can be vindicated, and that is all the appellant asks. It prays that the Commission "be required to grant to the plaintiff a hearing on the issue of the value of said claim, and subsequent to such hearing be required to decide such claim in accordance with the provisions of the Act . . . ."

I am not concerned with the alleged absence of a constitutional question. The right to a hearing is a valuable right conferred by the statute and deprivation of it is *per se* prejudicial. I cannot agree that the Commission may with impunity nullify the legislative requirement that it grant a hearing. Members of the Congress which enacted this legislation will be surprised, I imagine, to learn from the majority opinion that the Commission cannot be compelled to grant the hearing which they ordered it to afford. I cannot believe it was the legislative intent in enacting this statute to immunize unlawful administrative action from correction by the courts. Nor do I believe that in any case, no matter how strongly it may word a provision for immunity from judicial review, Congress can prevent a court of competent jurisdiction from compelling an administrative agency to proceed as required by its governing statute. Nor is there any reason apparent to me why Congress should desire to do so, for in the absence of such judicial power there is no protection against administrative abuse such as occurred in this case, and a wrong can be perpetrated for which there is no remedy.

This brings me to the second of the two questions stated at the outset and which the majority think it unnecessary to consider: is the Commission's stoutly disputed decision that it did in fact grant a hearing open

to judicial review? It must be; for if it is not, the Commission may refuse to grant a hearing and avoid judicial coercion to do so by simply stating that it regards its procedure as sufficient compliance with the statutory requirement. Its action in thus evaluating its own procedure is not within the letter or the spirit of the provision for immunity from review. It is more important that the agency be required to toe the statutory mark than it is to avoid delay by letting its denial of the right to a hearing go unchallenged.

In this case I think it clear that the Commission denied to the appellant the hearing to which Congress said it is entitled, but, in view of the majority decision, detailed discussion of the reasons for my conclusion would be pointless. I would set aside the District Court's judgment and remand the case for entry of an order requiring the Commission to conduct a hearing before reaching a decision on the merits.

Statutes and Rules

INTERNATIONAL CLAIMS SETTLEMENT ACT OF 1949

c. 54, 64 Stat. 13 et seq.;
22 USCA Section 1621 et seq.

Section 4 • • •

(h) The Commission shall notify all claimants of the approval or denial of their claims, stating the reasons and grounds therefor, and, if approved, shall notify such claimants of the amount for which such claims are approved. Any claimant whose claim is denied, or is approved for less than the full amount of such claim, shall be entitled, under such regulations as the Commission may prescribe, to a hearing before the Commission, or its duly authorized representatives, with respect to such claim. Upon such hearing, the Commission may affirm, modify, or revise its former action with respect to such claim, including a denial or reduction in the amount theretofore allowed with respect to such claim. The action of the Commission in allowing or denying any claim under this Act shall be final and

conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise.

* * *

(j) The Commission shall comply with the provisions of the Administrative Procedure Act of 1946 except as otherwise specifically provided by this Act.

* * *

ADMINISTRATIVE PROCEDURE ACT OF 1946

c. 324, 60 Stat. 237 et seq.;
5 USCA, Section 1001 et seq.

* * *

Section 1006 (c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *

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RULES OF PRACTICE AND PROCEDURE OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION

22 CFR, Ch. III, Section 301 et seq.

* * *

Sec. 300.6 *Hearings.* (a) Hearings, whether upon the Commission's own motion or upon request of claimant shall be held upon fifteen days' notice of the time and place

thereof and of the questions to which limited, to the claimant and to the foreign government concerned, or sooner upon consent by the claimant and notice thereof to the foreign government concerned.

• • •

(c) Such hearings shall be conducted by the Commission or a member thereof, presiding. Oral testimony and documentary evidence, including depositions that may have been taken as provided by statute, may be offered in evidence on claimant's behalf, or by counsel for the Commission designated by it to represent the public interest opposed to the allowance of any unjust or unfounded claim or portion thereof; and either may cross-examine as to evidence offered through witnesses on behalf of the other. Objections to the admission of any such evidence shall be ruled upon by the presiding officer.

(d) The claimant shall be the moving party, and shall have the burden of proof on all issues involved in the determination of its claim.

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